



(Billing Code 5001-06)

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 212, 225, and 252

[Docket DARS-2015-0024]

RIN 0750-AI41

Defense Federal Acquisition Regulation Supplement: Photovoltaic Devices from the United States (DFARS Case 2015-D007)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2015 that revises the restrictions relating to utilization of domestic photovoltaic devices.

DATES: Effective [Insert date of publication in the **FEDERAL REGISTER**].

FOR FURTHER INFORMATION CONTACT: Ms. Amy G. Williams, telephone 571-372-6106; facsimile 571-372-6101.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the Federal Register at 80 FR 30119 on May 26, 2015, to implement section 858 of the National

Defense Authorization Act (NDAA) for Fiscal Year (FY) 2015 (Pub. L. 113-291), which addresses utilization of domestic photovoltaic devices. Three respondents submitted comments on the proposed rule.

II. Discussion and Analysis

A. Summary of Significant Changes from the Proposed Rule

There are no significant changes from the proposed rule.

B. Analysis of Public Comments

1. Trade Agreements Act

Comment: One respondent was very supportive of the exceptions for use of photovoltaic devices from designated countries in acquisitions covered by a Trade agreement. The respondent cited legal reasons for the exception (i.e., section 858 specifically states that the restrictions are "subject to exceptions provided in the Trade Agreements Act of 1979 (19 U.S.C. 2501 et seq.) or otherwise provided by law." In addition, the respondent considered the preservation of the Trade Agreements Act exception critical to the deployment of photovoltaic devices to meet the needs of the DoD market in a timely and cost-efficient manner.

Response: Both section 846 and section 858 state that the restrictions are subject to the exceptions provided in the Trade Agreements Act or otherwise provided by law. The Trade Agreements Act (19 U.S.C. 2501 et seq.) provides authority for

the President to waive the Buy American Act and other discriminatory provisions (e.g., sections 846 and 858) for eligible products from designated countries. This authority has been delegated to the United States Trade Representative (USTR). The USTR has confirmed that the trade agreements provide an exception to the domestic source restrictions of section 858. Since the Trade Agreements Act exception is specifically provided in law, it remains in the final rule.

2. Covered contract

a. Enhanced use leases

Comment: One respondent recommended that DoD should clarify that while the real estate procurement action related to the development of photovoltaic generating assets on DoD land is not subject to the DFARS, the purchase of the output of the photovoltaic devices is (1) a separate procurement action; (2) an acquisition under DoD procurement regulations; and (3) a covered contract under section 858. According to the respondent, DoD may accept the provision of payment of utility services as in-kind consideration for leasing DoD real property interests in an amount not less than the fair market value of the leasehold. Although the respondent agreed that the DFARS does not cover land leases, the respondent asserted that a power purchase agreement for the procurement of power generated from a photovoltaic device located on land awarded through enhanced-use

lease (EUL) authority, whether a combined procurement or a separate procurement after the EUL is awarded, is not a real estate transaction, but is a covered contract because it is installed on DoD property and is an acquisition subject to the DFARS.

Response: DoD land leases are not governed by the Federal Acquisition Regulations (FAR) or the DFARS, as the FAR system only covers acquisition of supplies and services. The term "supplies" is defined in the FAR as all property except land or interest in land. Therefore, power generated from a photovoltaic device and provided to an installation as in-kind consideration under a land lease is not governed by the FAR, DFARS, or this rule. Real property transactions are addressed under other authorities. To the extent the DoD is contracting for power through a FAR-type contract, this DFARS provision would apply. A separately signed power purchase agreement for the power generated by a photovoltaic device installed on DoD land outgranted under a DoD lease, is (1) a FAR contract and (2) a covered contract for the purposes of this rule.

b. Off-site power generation

Comment: One respondent recommended that DoD should clarify that section 858 applies to covered contracts awarded by DoD components utilizing photovoltaic devices located on off-site, private property, so long as the photovoltaic devices are

reserved for the use of DoD for the full economic life of the device.

Response: The final Regulatory Flexibility Act analysis has been revised to clarify that section 858 applies to DoD when purchasing renewable power generated via photovoltaic devices. DoD can either purchase the photovoltaic devices (own, operate and maintain the devices for their full economic life), enter into Energy Savings Performance Contracts, or enter into power purchase agreements for the purchase of the power output from photovoltaic devices that are installed on DoD land or buildings, or off-site on private land.

c. Need for Trade Agreements Act exception

Comment: According to one respondent, the broadened definition of "covered contract" will further enable expansion of the market transition to utility scale procurement of photovoltaic devices for military use. However, the respondent stated that without the Trade Agreements Act exception, the market will not be able to be served in a timely and efficient manner.

Response: The Trade Agreements Act exception is specifically provided in law and remains in the final rule.

3. Definitions

a. "Domestic photovoltaic device"

Comment: According to one respondent, the modification of the definition of "domestic photovoltaic device" to include the requirement that the cost of all components mined, produced, or manufactured in the United States must exceed 50 percent of the cost of all components, makes the Trade Agreements Act exception even more essential.

Response: The Trade Agreements Act exception is specifically provided in law and remains in the final rule.

b. "Substantial transformation"

Comment: One respondent stated that DoD should amend paragraph (c) of the provision at DFARS 252.225-7018, Photovoltaic Devices—Certificate, to explicitly adopt and apply the Department of Commerce's definition of "substantial transformation" for photovoltaic devices, stating that substantial transformation of a photovoltaic device takes place in the country where a photovoltaic device's cell is manufactured.

Response: The interpretation of "substantial transformation" is outside the scope of this case. Section 858 did not address or modify the meaning of "substantial transformation." Paragraph (c) of the provision at DFARS 252.225-7018 was not included in the Federal Register notice of the proposed rule under this case. The preamble to the proposed rule under this

case specifically stated that the previous rule published to clarify this DoD policy will remain unaffected.

Paragraph (c) was added to the provision at DFARS 252.225-7017 under DFARS Case 2014-D006, Photovoltaic Devices, to clarify how offerors should assess the rules of origin for photovoltaic devices to be utilized under covered DoD contracts. Paragraph (c) advises offerors to be consistent with country of origin determinations by the U.S. Customs and Border Protection with regard to importation of the same or similar photovoltaic devices into the United States. If the offeror is uncertain as to the origin of a photovoltaic device, the provision directs the offeror to request a determination from U.S. Customs and Border Protection. It is not within the purview of DoD to make such determinations. DoD published the final rule on April 21, 2014, after consultation with the United States Trade Representative and thorough analysis of the public comments received.

c. "U.S.-made photovoltaic device"

Comment: One respondent recommended that DoD should revise the definition of U.S.-made photovoltaic device to conform to the other country of origin definitions applicable to photovoltaic devices and require U.S.-made photovoltaic devices to be wholly manufactured or substantially transformed in the United States.

Response: The FAR was modified in February 2000 (FAC 97-15) to include the term "U.S.-made end product," defined to mean an article that is mined, produced, or manufactured in the United States or that is substantially transformed in the United States into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. This term was introduced to provide an opportunity, when an acquisition is subject to the World Trade Organization Government Procurement Agreement, for products made in the United States (which are not designated country end products, and therefore not subject to the trade agreements rules of origin) to compete with designated country end products. Through a public interest class determination, DoD does not apply the Buy American Act to U.S.-made end products if the World Trade Organization Government Procurement Agreement applies. Therefore, when section 846 of the NDAA for FY 2011 required certain covered contracts awarded by DoD to contain a provision requiring the photovoltaic devices provided under the contract to comply with the Buy American Act, subject to the exceptions provided in the Trade Agreements Act of 1979, the DFARS applied the existing public interest class determination to exempt the utilization of U.S.-made photovoltaic devices (treating photovoltaic devices as a specific item fitting within the existing FAR definition of

"U.S.-made end products") from the restrictions of section 846 and the Buy American Act.

4. Public interest determinations

a. Impact on domestic manufacturing

Comment: One respondent contended that issuing a public interest waiver as a work around to addressing differing documentation requirements between U.S.-based and designated country photovoltaic manufacturers would reduce the desired connection to domestic manufacturing activities, and therefore presents a suboptimal approach.

Response: The public interest waiver of section 858 for acquisition of U.S.-made photovoltaic devices was not only to address differing documentation requirements, but to enable acquisition from a broad range of U.S. companies. Section 858 of the NDAA for FY 2015 allows the head of the department concerned to determine, on a case-by-case basis that application of section 858 is not in the public interest. As delegated in this rule, the head of the contracting activity concerned may make such a public interest determination for a variety of reasons. The rule provides a sample determination based on the utilization of a U.S.-made device because this is consistent with existing practice, except that now an individual determination is required each time utilization of U.S.-made devices is proposed. Use of this determination was suggested

only when the value of the acquisition exceeds \$204,000 and the World Trade Organization Government Procurement Agreement applies. It is in the Government's best interest to foster a competitive environment and encourage manufacturing in the United States.

b. Time delay

Comment: One respondent, while recognizing that public interest determinations can provide flexibility, was concerned that obtaining an individual public interest determination on a case-by-case basis could cause delay in project implementation.

Response: Section 858 specifically requires approval of public interest determinations on a case-by-case basis. The DFARS rule specifies the head of the contracting activity as approval authority. This approval process is not anticipated to unreasonably delay DoD procurements.

5. Sanctioned countries

Comment: One respondent recommended that the rule should ensure that companies from the list of sanctioned countries should be prohibited from undertaking U.S. military solar projects, regardless of where or how the goods are manufactured.

Response: Since the FAR and DFARS contain specific implementation of the Office of Foreign Assets Control restrictions and additional title 10, U.S.C., statutory restrictions on contracting with prohibited sources that apply

to both DoD prime contractors and to their subcontractors in accordance with flow down provisions, the rule does not need to be modified. Such prohibitions are already effectively implemented in the regulations that apply to contracts awarded by executive branch agencies U.S. Government and to contracts awarded by DoD military departments and defense agencies.

III. Applicability

Consistent with the determinations that DoD made with regard to application of the requirements of section 846 of NDAA for FY 2011, this rule does not apply the requirements of section 858 of the NDAA for FY 2015 to contracts at or below the simplified acquisition threshold (SAT), but does apply to contracts for the acquisition of commercial items, including commercially available off-the-shelf (COTS) items.

A. Applicability to Contracts at or Below the SAT

41 U.S.C. 1905 governs the applicability of laws to contracts or subcontracts in amounts not greater than the simplified acquisition threshold. It is intended to limit the applicability of laws to such contracts or subcontracts. 41 U.S.C. 1905 provides that if a provision of law contains criminal or civil penalties, or if the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the SAT, the law will apply to them. The Director,

Defense Procurement and Acquisition Policy (DPAP), is the appropriate authority to make comparable determinations for regulations to be published in the DFARS, which is part of the FAR system of regulations. DoD did not make that determination. Therefore, this rule does not apply below the simplified acquisition threshold.

B. Applicability to Contracts for the Acquisition of Commercial Items, Including COTS Items.

41 U.S.C. 1906 governs the applicability of laws to contracts for the acquisition of commercial items, and is intended to limit the applicability of laws to contracts for the acquisition of commercial items. 41 U.S.C. 1906 provides that if a provision of law contains criminal or civil penalties, or if the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt commercial item contracts, the provision of law will apply to contracts for the acquisition of commercial items. Likewise, 41 U.S.C. 1907 governs the applicability of laws to COTS items, with the Administrator for Federal Procurement Policy the decision authority to determine that it is in the best interest of the Government to apply a provision of law to acquisitions of COTS items in the FAR. The Director, DPAP, is the appropriate authority to make comparable determinations for regulations to

be published in the DFARS, which is part of the FAR system of regulations.

Given that the requirements of section 858 of the NDAA for FY 2015 were enacted to promote utilization of domestic photovoltaic devices, and since photovoltaic devices are generally COTS items, DoD has determined that it is in the best interest of the Federal Government to apply the rule to contracts for the acquisition of commercial items, including COTS items, as defined at FAR 2.101. An exception for contracts for the acquisition of commercial items, including COTS items, would exclude the contracts intended to be covered by the law, thereby undermining the overarching public policy purpose of the law.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section

6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Regulatory Flexibility Act

A final regulatory flexibility analysis has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., and is summarized as follows:

This rule implements section 858 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2015 (Pub. L. 113-291), by changing the regulatory coverage on utilization of domestic photovoltaic devices under certain covered contracts.

The objective of this rule is to further promote utilization of domestic photovoltaic devices under DoD covered contracts, while maintaining compliance with trade agreements, reciprocal defense procurement memoranda of understanding, and DoD policy with regard to the acquisition of designated country photovoltaic devices, qualifying country photovoltaic devices, and U.S.-made photovoltaic devices.

There were no significant issues raised by the public comments in response to the initial regulatory flexibility analysis. There was one comment on the terminology used to describe the applicability of the rule to small entities, but this did not impact the numerical analysis or the rule itself.

This rule generally applies at the prime contract level to other than small entities. When purchasing renewable power generated via photovoltaic devices, DoD can either purchase the photovoltaic devices and thereby own, operate, and maintain the devices for their full economic life (already covered in DFARS part 225 under standard Buy American Act/Trade Agreements regulations) or, for example, may do some variation of the following:

a. Enter into an energy savings performance contract, which is a contracting method in which the contractor provides capital to facilitate energy savings projects and maintains them in exchange for a portion of the energy savings generated. Under this arrangement, the Government would take title to the devices during contract performance or at the conclusion of the contract. For example, the Defense Logistics Agency-Energy uses the master Department of Energy indefinite delivery-indefinite quantity contract and awards task orders off that contract. Of the 16 contractors, all are large businesses. There are subcontracting goals that each contractor has to meet, but the ultimate task order award is made to a large business.

b. Enter into a power purchase agreement, also referred to as a utility service contract, for the purchase of the power output of photovoltaic devices that are installed on DoD land or buildings, or on private land, but are owned, operated, and

maintained by the contractor. At the conclusion of the contract, DoD would either require the contractor to dismantle and remove the photovoltaic equipment or abandon the equipment in place. Prime contractors for this type of contract would generally be large businesses, based on the capital costs involved in these projects. However, many developers tend to subcontract out the majority of work to smaller companies.

There are approximately 80 manufacturers of photovoltaic devices. We do not currently have data available on whether any of the manufacturers of photovoltaic devices are small entities, because the Federal Procurement Data System does not collect such data on subcontractors.

There are no new reporting burdens under this rule. There are some negligible variations to the existing reporting burdens. Furthermore, since the prime contractors subject to this rule are other than small businesses, the reporting requirements will not impact small entities.

However, under section 858, if the aggregate value of the photovoltaic devices to be utilized under a contract is less than \$204,000, or unless a waiver is obtained for the utilization of U.S.-made products when the aggregate value of the photovoltaic devices is \$204,000 or more, there will be a requirement to track the origin of the components of the domestic photovoltaic devices. However, DoD estimates that most

covered contracts will involve utilization of photovoltaic devices with an aggregate value in excess of \$204,000 and expects to grant waivers as appropriate.

DoD did not identify any significant alternatives that meet the requirements of the statute and would have less impact on small entities. The ability for the Government to grant a waiver of section 858 if it is inconsistent with the public interest to preclude utilization of U.S.-made photovoltaic devices when the World Trade Organization Government Procurement Agreement is applicable (i.e., the aggregate value of the photovoltaic devices to be utilized is \$204,000 or more) will greatly reduce the burden on manufacturers of photovoltaic devices, regardless of the size of the entity.

VI. Paperwork Reduction Act

The rule contains information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C chapter 35); however, these changes to the DFARS do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 0704-0229, entitled "Defense Federal Acquisition Regulation Supplement (DFARS) Part 225, Foreign Acquisition, and related clauses at DFARS 252.225."

List of Subjects in 48 CFR Parts 212, 225, and 252

Government procurement.

Jennifer L. Hawes

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 212, 225, and 252 are amended as follows:

1. The authority citation for parts 212, 225, and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 212—ACQUISITION OF COMMERCIAL ITEMS

2. In section 212.301, revise paragraphs (f) (x) (J) and (f) (x) (K) to read as follows:

212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

* * * * *

(f) * * *

(x) * * *

(J) Use the clause at 252.225-7017, Photovoltaic Devices, as prescribed in 225.7017-5(a), to comply with section 858 of Public Law 113-291).

(K) Use the provision at 252.225-7018, Photovoltaic Devices—Certificate, as prescribed in 225.7017-5(b), to comply with section 858 of Public Law 113-291.

* * * * *

PART 225—FOREIGN ACQUISITION

3. Amend section 225.7017 by—

- a. Revising sections 225.7017-1 through 225.7017-3;
- b. Redesignating section 225.7017-4 as 225.7017-5;
- c. Adding new section 225.7017-4; and
- d. In the newly redesignated 225.7017-5, revising the section heading and paragraph (a).

The revisions and addition read as follows:

225.7017 Utilization of domestic photovoltaic devices.

225.7017-1 Definitions.

As used in this section—

Caribbean Basin country photovoltaic device means a photovoltaic device that—

- (1) Is wholly manufactured in a Caribbean Basin country; or
- (2) In the case of a photovoltaic device that consists in whole or in part of materials from another country, has been substantially transformed in a Caribbean Basin country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed, provided that the photovoltaic device is not subsequently substantially transformed outside of a Caribbean Basin country.

Covered contract means contract awarded by DoD that, by means other than DoD purchase as end products, provides for a photovoltaic device to be—

(1) Installed in the United States on DoD property or in a facility owned by DoD; or

(2) Reserved for the exclusive use of DoD in the United States for the full economic life of the device.

Designated country photovoltaic device means a World Trade Organization Government Procurement Agreement (WTO GPA) country photovoltaic device, a Free Trade Agreement country photovoltaic device, a least developed country photovoltaic device, or a Caribbean Basin country photovoltaic device.

Domestic photovoltaic device means a photovoltaic device that—

(1) Is manufactured in the United States; and

(2) The cost of its components that are mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all components. The cost of components includes transportation costs to the place of incorporation into the end product and U.S. duty (whether or not a duty-free entry certificate is issued). Scrap generated, collected, and prepared for processing in the United States is considered domestic.

Foreign photovoltaic device means a photovoltaic device other than a domestic photovoltaic device.

Free Trade Agreement country photovoltaic device means a photovoltaic device that—

(1) Is wholly manufactured in a Free Trade Agreement country;

or

(2) In the case of a photovoltaic device that consists in whole or in part of materials from another country, has been substantially transformed in a Free Trade Agreement country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed, provided that the photovoltaic device is not subsequently substantially transformed outside of a Free Trade Agreement country.

Least developed country photovoltaic device means a photovoltaic device that—

(1) Is wholly manufactured in a least developed country; or

(2) In the case of a photovoltaic device that consists in whole or in part of materials from another country, has been substantially transformed in a least developed country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed, provided that the photovoltaic device is not subsequently substantially transformed outside of a least developed country.

Photovoltaic device means a device that converts light directly into electricity through a solid-state, semiconductor process.

Qualifying country photovoltaic device means a photovoltaic device manufactured in a qualifying country.

U.S.-made photovoltaic device means a photovoltaic device that—

(1) Is manufactured in the United States; or

(2) Is substantially transformed in the United States into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed, provided that the photovoltaic device is not subsequently substantially transformed outside of the United States.

WTO GPA country photovoltaic device means a photovoltaic device that—

(1) Is wholly manufactured in a WTO GPA country; or

(2) In the case of a photovoltaic device that consists in whole or in part of materials from another country, has been substantially transformed in a WTO GPA country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed, provided that the photovoltaic device is not subsequently substantially transformed outside of a WTO GPA country.

225.7017-2 Restriction.

In accordance with section 858 of the National Defense Authorization Act for Fiscal Year 2015, photovoltaic devices provided under any covered contract shall be domestic photovoltaic devices, except as provided in 225.7017-3 and 225.7017-4.

225.7017-3 Exceptions.

(a) Free Trade Agreements. For a covered contract that utilizes photovoltaic devices valued at \$25,000 or more, photovoltaic devices may be utilized from a country covered under the acquisition by a Free Trade Agreement, depending upon dollar threshold (see FAR subpart 25.4).

(b) World Trade Organization-Government Procurement Agreement. For covered contracts that utilize photovoltaic devices that are valued at \$204,000 or more, only domestic photovoltaic devices or designated country photovoltaic devices may be utilized, unless acquisition of U.S.-made or qualifying country photovoltaic devices is allowed pursuant to a waiver in accordance with 225.7017-4(a).

225.7017-4 Waivers.

The head of the contracting activity is authorized to waive, on a case-by-case basis, the application of the restriction in 225.7017-2 upon determination that one of the following circumstances applies (see PGI 225.7017-4 for sample determinations and findings):

(a) Inconsistent with the public interest. For example, a public interest waiver may be appropriate to allow—

(1) Utilization of U.S.-made photovoltaic devices if the aggregate value of the photovoltaic devices to be utilized under the contract exceeds \$204,000; or

(2) Utilization of photovoltaic devices from a qualifying country, regardless of dollar value.

(b) Unreasonable cost. A determination that the cost of a domestic photovoltaic device is unreasonable may be appropriate if—

(1) The aggregate value of the photovoltaic devices to be utilized under the contract does not exceed \$204,000; and

(2) The offeror documents that the price of the foreign photovoltaic devices plus 50 percent is less than the price of comparable domestic photovoltaic devices.

225.7017-5 Solicitation provision and contract clause.

(a)(1) Use the clause at 252.225-7017, Photovoltaic Devices, in solicitations, including solicitations using FAR part 12 procedures for the acquisition of commercial items, for a contract that—

(i) Is expected to exceed the simplified acquisition threshold; and

(ii) May be a covered contract, i.e., a contract that provides for a photovoltaic device to be—

(A) Installed in the United States on DoD property or in a facility owned by DoD; or

(B) Reserved for the exclusive use of DoD in the United States for the full economic life of the device.

(2) Use the clause in the resultant contract, including contracts using FAR part 12 procedures for the acquisition of commercial items, if it is a covered contract.

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PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

4. Amend section 252.225-7017—

a. In the introductory text, by removing “225.7017-4(a)” and adding “225.7017-5(a)” in its place;

b. By removing the clause date “(OCT 2015)” and adding “(NOV 2015)” in its place;

c. In paragraph (a), by removing “an article that” and adding “a photovoltaic device that” in its place wherever it appears, and revising the definition of “Domestic photovoltaic device”; and

d. By revising paragraphs (b) and (c).

The revisions read as follows:

252.225-7017 Photovoltaic Devices.

* * * * *

(a) * * *

Domestic photovoltaic device means a photovoltaic device—

(i) Manufactured in the United States; and

(ii) The cost of its components that are mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all components. The cost of components includes transportation costs to the place of incorporation into the end product and U.S. duty (whether or not a duty-free entry certificate is issued). Scrap generated, collected, and prepared for processing in the United States is considered domestic.

* * * * *

(b) This clause implements section 858 of the National Defense Authorization Act for Fiscal Year 2015 (Pub. L. 113-291).

(c) Restriction. If the Contractor specified in its offer in the Photovoltaic Devices–Certificate provision of the solicitation that the estimated value of the photovoltaic devices to be utilized in performance of this contract would be–

(1) Less than \$25,000, then the Contractor shall utilize only domestic photovoltaic devices unless, in its offer, it specified utilization of qualifying country or other foreign photovoltaic devices in paragraph (d) (2) of the Photovoltaic Devices–Certificate provision of the solicitation. If the Contractor certified in its offer that it will utilize a qualifying country photovoltaic device, then the Contractor shall utilize a qualifying country photovoltaic device as specified, or, at the Contractor's option, a domestic photovoltaic device;

(2) \$25,000 or more but less than \$79,507, then the Contractor shall utilize in the performance of this contract only domestic photovoltaic devices unless, in its offer, it specified utilization of Canadian, qualifying country, or other foreign photovoltaic devices in paragraph (d) (3) of the Photovoltaic Devices–Certificate provision of the solicitation. If the Contractor certified in its offer that it will utilize a qualifying country photovoltaic device or a Canadian photovoltaic device, then the Contractor shall utilize a qualifying country photovoltaic

device or a Canadian photovoltaic device as specified, or, at the Contractor's option, a domestic photovoltaic device;

(3) \$79,507 or more but less than \$100,000, then the Contractor shall utilize under this contract only domestic photovoltaic devices or Free Trade Agreement country photovoltaic devices (other than Bahrainian, Korean, Moroccan, Panamanian, or Peruvian photovoltaic devices), unless, in its offer, it specified utilization of qualifying country or other foreign photovoltaic devices in paragraph (d) (4) of the Photovoltaic Devices—Certificate provision of the solicitation. If the Contractor certified in its offer that it will utilize a qualifying country photovoltaic device or a Free Trade Agreement country photovoltaic device (other than a Bahrainian, Korean, Moroccan, Panamanian, or Peruvian photovoltaic device), then the Contractor shall utilize a qualifying country photovoltaic device; a Free Trade Agreement country photovoltaic device (other than a Bahrainian, Korean, Moroccan, Panamanian, or Peruvian photovoltaic device) as specified; or, at the Contractor's option, a domestic photovoltaic device;

(4) \$100,000 or more but less than \$204,000, then the Contractor shall utilize under this contract only domestic photovoltaic devices or Free Trade Agreement country photovoltaic devices (other than Bahrainian, Moroccan, Panamanian, or Peruvian photovoltaic devices), unless, in its offer, it specified utilization of qualifying country or other foreign photovoltaic

devices in paragraph (d) (5) of the Photovoltaic Devices–Certificate provision of the solicitation. If the Contractor certified in its offer that it will utilize a qualifying country photovoltaic device or a Free Trade Agreement country photovoltaic device (other than a Bahrainian, Moroccan, Panamanian, or Peruvian photovoltaic device), then the Contractor shall utilize a qualifying country photovoltaic device; a Free Trade Agreement country photovoltaic device (other than a Bahrainian, Moroccan, Panamanian, or Peruvian photovoltaic device) as specified; or, at the Contractor's option, a domestic photovoltaic device; or

(5) \$204,000 or more, then the Contractor shall utilize under this contract only domestic or designated country photovoltaic devices unless, in its offer, it specified utilization of U.S.-made or qualifying country photovoltaic devices in paragraph (d) (6) (ii) or (iii) respectively of the Photovoltaic Devices–Certificate provision of the solicitation. If the Contractor certified in its offer that it will utilize a designated country, U.S.-made, or qualifying country photovoltaic device, then the Contractor shall utilize a designated country, U.S.-made, or qualifying country photovoltaic device as specified, or, at the Contractor's option, a domestic photovoltaic device.

(End of clause)

5. Amend section 252.225-7018–

- a. In the introductory text, by removing "225.7017-4(b)" and adding "225.7017-5(b)" in its place;
- b. By removing the clause date "(OCT 2015)" and adding "(NOV 2015)" in its place;
- c. By revising paragraph (b);
- d. In paragraph (c), by removing "(See <http://www.cbp.gov/xp/cgov/trade/legal/rulings.>)" and adding "(See <http://www.cbp.gov/trade/rulings.>)" in its place; and
- e. By revising paragraph (d).

The revisions read as follows:

252.225-7018 Photovoltaic Devices—Certificate.

* * * * *

(b) Restrictions. The following restrictions apply, depending on the estimated aggregate value of photovoltaic devices to be utilized under a resultant contract:

(1) If less than \$204,000, then the Government will not accept an offer specifying the use of—

(i) Other foreign photovoltaic devices in paragraph (d) (2) (iii), (d) (3) (iii), (d) (4) (iii), or (d) (5) (iii) of this provision, unless the offeror documents to the satisfaction of the Contracting Officer that the price of the foreign photovoltaic device plus 50 percent is less than the price of a comparable domestic photovoltaic device and the Government determines in

accordance with DFARS 225.217-4(b) that the price of a comparable domestic photovoltaic device would be unreasonable; and

(ii) A qualifying country photovoltaic device unless the Government determines in accordance with DFARS 225.217-4(a) that it is in the public interest to allow use of a qualifying country photovoltaic device.

(2) If \$204,000 or more, then the Government will consider only offers that utilize photovoltaic devices that are domestic or designated country photovoltaic devices, unless the Government determines in accordance with DFARS 225.7017-4(a) that it is in the public interest to allow use of a qualifying country photovoltaic device from Egypt or Turkey, or a U.S.-made photovoltaic device.

* * * * *

(d) Certification and identification of country of origin.

[The offeror shall check the block and fill in the blank for one of the following paragraphs, based on the estimated value and the country of origin of photovoltaic devices to be utilized in performance of the contract:]

___ (1) No photovoltaic devices will be utilized in performance of the contract.

(2) If less than \$25,000—

___ (i) The offeror certifies that each photovoltaic device to be utilized in performance of the contract is a domestic photovoltaic device;

___ (ii) The offeror certifies that each photovoltaic device to be utilized in performance of the contract is a qualifying country photovoltaic device [Offeror to specify country of origin _____]; or

___ (iii) The foreign (other than qualifying country) photovoltaic devices to be utilized in performance of the contract are the product of _____. [Offeror to specify country of origin, if known, and provide documentation that the cost of a domestic photovoltaic device would be unreasonable in comparison to the cost of the proposed foreign photovoltaic device, i.e., that the price of the foreign photovoltaic device plus 50 percent is less than the price of a comparable domestic photovoltaic device.]

(3) If \$25,000 or more but less than \$79,507—

___ (i) The offeror certifies that each photovoltaic device to be utilized in performance of the contract is a domestic photovoltaic device or a Canadian photovoltaic device [Offeror to specify country of origin _____];

___ (ii) The offeror certifies that each photovoltaic device to be utilized in performance of the contract is a qualifying country photovoltaic device [Offeror to specify country of origin _____]; or

___ (iii) The foreign (other than qualifying country or Canadian) photovoltaic devices to be utilized in performance of the contract are the product of _____. [Offeror to

specify country of origin, if known, and provide documentation that the cost of a domestic photovoltaic device would be unreasonable in comparison to the cost of the proposed foreign photovoltaic device, i.e., that the price of the foreign photovoltaic device plus 50 percent is less than the price of a comparable domestic photovoltaic device.]

(4) If \$79,507 or more but less than \$100,000—

___ (i) The offeror certifies that each photovoltaic device to be utilized in performance of the contract is a domestic photovoltaic device or a Free Trade Agreement country photovoltaic device (other than a Bahrainian, Korean, Moroccan, Panamanian, or Peruvian photovoltaic device) [Offeror to specify country of origin _____];

___ (ii) The offeror certifies that each photovoltaic device to be utilized in performance of the contract is a qualifying country photovoltaic device (except an Australian or Canadian photovoltaic device, to be listed in paragraph (d) (4) (i) of this provision as a Free Trade Agreement country photovoltaic device) [Offeror to specify country of origin _____]; or

___ (iii) The offered foreign photovoltaic devices (other than those from countries listed in paragraph (d) (4) (i) or (d) (4) (ii) of this provision) are the product of _____.
[Offeror to specify country of origin, if known, and provide documentation that the cost of a domestic photovoltaic device would

be unreasonable in comparison to the cost of the proposed foreign photovoltaic device, i.e., that the price of the foreign photovoltaic device plus 50 percent is less than the price of a comparable domestic photovoltaic device.]

(5) If \$100,000 or more but less than \$204,000—

___ (i) The offeror certifies that each photovoltaic device to be utilized in performance of the contract is a domestic photovoltaic device or a Free Trade Agreement country photovoltaic device (other than a Bahrainian, Moroccan, Panamanian, or Peruvian photovoltaic device) [Offeror to specify country of origin _____];

___ (ii) The offeror certifies that each photovoltaic device to be utilized in performance of the contract is a qualifying country photovoltaic device (except an Australian or Canadian photovoltaic device, to be listed in paragraph (d) (5) (i) of this provision as a Free Trade Agreement country photovoltaic device) [Offeror to specify country of origin _____]; or

___ (iii) The offered foreign photovoltaic devices (other than those from countries listed in paragraph (d) (5) (i) or (d) (5) (ii) of this provision) are the product of _____. [Offeror to specify country of origin, if known, and provide documentation that the cost of a domestic photovoltaic device would be unreasonable in comparison to the cost of the proposed foreign photovoltaic device, i.e., that the price of the foreign

photovoltaic device plus 50 percent is less than the price of a comparable domestic photovoltaic device.]

(6) If \$204,000 or more, the Offeror certifies that each photovoltaic device to be used in performance of the contract is—

___ (i) A domestic or designated country photovoltaic device
[Offeror to specify country of origin];

___ (ii) A U.S.-made photovoltaic device; or

___ (iii) A qualifying country photovoltaic device from
Egypt or Turkey (photovoltaic devices from other qualifying
countries to be listed in paragraph (d) (6) (i) of this provision as
designated country photovoltaic devices). [Offeror to specify
country of origin .]

(End of provision)

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